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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ADOLF MEYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in the enforcement of the First Amendment a federal appellate court may refuse to review pictures of nude post-adolescent males not portraying sexual activity as obscene or lewd because the defendant stipulated to the sufficiency of the obscenity in a non-jury trial?

2. Whether a defendant may be punished consecutively for the specific violation of importing sexually explicit material (18 U.S.C. 2252(a)(1)) and the general violation of importing "contrary to law" (18 U.S.C. 545)?

3. Whether a federal court may use uncharged criminal misconduct in violation of state and foreign law as the principal basis in imposing the sentence for a federal law violation and whether Due Process requires that the punishment fit the crime charged?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Adolf Meyer, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **United States v. Adolf Meyer.**

OPINION BELOW

The opinion of the Court of Appeals

affirmed the conviction and sentence of the petitioner and is officially reported at 802 F.2d 348 (9th Cir 1986). A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 14 October 1986 the Court of Appeals entered judgment affirming the conviction of the petitioner for importing lewd and obscene photographs in violation of federal law. On 25 February 1987 his petition for rehearing and suggestion for rehearing en banc was denied. (Appendix B). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252(a)(1):

> Any person who knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct.

18 U.S.C. 2255(2):

"[S]exually explicit conduct" means actual or simulated ... (E) lascivious exhibition of the genitals or pubic area of any person.[1]

18 U.S.C. 545:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law....

STATEMENT OF THE CASE

Both violations (18 U.S.C. 2252(a)(1) and 545) were based on the stipulation presented at the non-jury trial. The stipulation consisted of 13 photographs found in the possession of the petitioner when he crossed the Mexican border into the United States. The 13 photographs were of young males, one 15 and one-half and the other seventeen and one-half years old. Each photo shows a single male nude or in a state of partial undress. There is no touching,

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[1] The petitioner was charged with the pre-1984 amendment language: "lewd exhibition of the genitals or public area."

fondling, or activity with the genitals.

The district court had original jurisdiction pursuant to 18 U.S.C. 3231. Jurisdiction in the Court of Appeals was based on 28 U.S.C. 1291.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE REFUSAL OF THE FEDERAL COURT OF APPEALS TO REVIEW THE OBSCENITY OF THE MATERIALS THAT WERE THE BASIS OF CONTESTED LITIGATION WAS A JUDICIAL ABANDONMENT OF THE FIRST AMENDMENT AND VIOLATED THE PRECEDENT OF THIS COURT.

Although trial defense counsel agreed to the sufficiency of the obscenity of the pictures submitted to the court pursuant to the stipulation, the trial judge made an express finding of "sexually explicit conduct, specifically a lewd exhibition of the genitals" as to Section 2252(a)(1) violation "obscene" as to the Section 545 violation (RT 136)[2].That judgment was

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[2] The district court followed the language of the indictment. No analysis was done under **Miller v. California**, 413 U.S. 15 (1973) or **New York v. Ferber**, 458 U.S. 747 (1982). The petitioner received the 10-

subject to review by the federal court of appeals for the sufficiency of the evidence in a criminal case. **Jackson v. Virginia**, 443 U.S. 307 (1979)(a rational fact finder based upon the evidence of record must find proof beyond a reasonable doubt); **Smith v. United States**, 431 U.S. 291, 305-306 (1977).

In speaking of the responsibility of reviewing courts in these cases, Justice Brennan in **Jacobellis v. Ohio**, 378 U.S. 184, 190 (1964) stated:

> Hence we reaffirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional

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year maximum sentence under Section 2252 and the 5-year maximum, consecutively, under Section 545. On 13 April 1987 the district modified the 15-year term by suspending it and placing the petitioner on 5 years probation. The petitioner, a permanent resident but a German national, was taken into custody of the Immigration and Naturalization Service and has been order excluded from the United States. Since the petitioner is under a suspended 15-year sentence, this Court retains jurisdiction. **United States v. Campos-Serrano**, 404 U.S. 293, 294 n.2 (1971).

judgment on the facts of the case as to whether the material involved is constitutionally protected. (Emphasis added.)

In **Cote v. United States**, 413 U.S. 915 (1973), this Court reversed an obscenity conviction based on a plea of guilty and remanded to the court of appeals in light of **Miller v. California**, 413 U.S. 15 (1973), and other precedent.[3] Recently, in **Bose Corp. v. Consumers Union**, 466 U.S. 485 (1984), this Court stated the duty of review as to both the issue of obscenity (**Miller**) and sexually explicit material involving minors (**Ferber**):

Similarly, although under **Miller v. California**, 413 U.S. 15 (1973), the question of what appeals to "prurient interest" and what is "patently offense" under the community standard obscenity test are

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[3] In **Cote**, the Court of Appeals as a matter of law refused to refuse the issue of obscenity because the defendant had pled guilty. 470 F.2d 755, 756. **Clique v. United States**, 514 F.2d 923, 927 (5th Cir. 1975), commenting on **Cote**, found a constitutional obligation for an "independent assessment" of the alleged obscene material.

"essentially questions of fact," id. at 30, we expressly recognized the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," id. at 25. We have therefore rejected the contention that a jury finding of obscenity vel non is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern. In **Jenkins v. Georgia**, 418 U.S. 153, 159-161 (1974), based on the independent examination of the evidence -- the exhibition of a motion picture -- the Court held that the film in question "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way...." Id., at 161. And in its recent opinion identifying a new category of unprotected expression -- child pornography- the Court expressly anticipated that an "independent examination" of the allegedly unprotected material may be necessary "to assure ourselves that the judgment ... 'does not constitute a forbidden intrusion on the field of free expression,'" **New York v. Ferber**, 458 U.S. at 774, n. 28

The photographs in the personal possession of the petitioner were not obscene. In **Spinar v. United States**, 440 F.2d 1241, 1242 (8th Cir. 1971), the court reversed a conviction involving photos of the male genital area:

The materials in question consist of

advertisements for 2' by 3' posters as well as the posters themselves. The subject matter depicted are nude or nearly nude males, all with their genitalia fully exposed. Most of the pictures show a single male, some portray more than one male. There is no sexual activity shown although in some of the pictures the male organ appears not to be in the state of complete repose. There is certainly no attempt by photographic artistry to shade or blur the genital area.

As to the Section 2252 violation, these photographs of a single postpubertal male not depicting any sexual activity cannot be characterized as child pornography. See **New York v. Ferber**, 458 U.S. 747, 774-775 (1982)(photos of 12-year-old boys masturbating held sufficient).

If the parties in a non-jury trial stipulated to the centerfold of **Playboy** as obscene and lewd, the Court of Appeals would have refused to review it. That decision conflicts with the precedent of this Court and the Fifth Circuit.

II. THE "CONTRARY TO LAW" PROVISION OF 18 U.S.C. 545 APPLIES EQUALLY TO 18 U.S.C. 2252(a)(1) SO THAT TWO OFFENSES MERGED FOR SENTENCING.

Section 545, paragraph two, prohibits merchandise "imported or brought into the United States contrary to law." This generic federal statute does not specify which law. The violation of Section 2252 arising out of the same factual transaction of bringing in 13 photos would be "contrary to law." The prosecutor chose to use 19 U.S.C. 1305, which declares obscene material to be subject to forfeiture, as the target offense of the Section 545 violation, but such prosecutorial construction does not create a separate offense from a generic statute when Congress has specifically created Section 2252. The circuit court never addressed the other specific statute prohibiting the importation of obscene materials (18 U.S.C. 1462), which is also a potential predicate for the Section 545 "contrary to law" violation. The Congressional scheme did not intend the general statute on importation to

give rise to additional separate offenses so as to permit multiplication of sentences.

This Court in **New York v. Ferber**, supra, created a lesser included standard of obscenity because of the involvement of minors. In **Ferber**, the defendants had been acquitted of the obscenity charges, but convicted under the state child pornography laws. 458 U.S. 747, 752. This court upheld that conviction, but the question now presented is whether the defendants could be convicted of both obscenity and minor[4] pornography. The same facts were used for each offense, but the elements of the offense are the same, except for the level of non-protected First Amendment expression. The circuit court held the obscenity requirement of Section 545 different than the "sexually explicit conduct" with minors

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[4] Federal law extends minor pornography to include any person under the age of 18 years. 18 U.S.C. 2255(1).

of Section 2252. Both involved the same element, but a different quantum of proof. These offenses did not permit separate consecutive punishment, but merged. The Section 2252 violation (lesser standard) merged into the Section 545 violation (greater standard).

III. THE PUNISHMENT IMPOSED BY A FEDERAL COURT MUST FIT THE CRIME FOR WHICH THE PETITIONER WAS CONVICTED AND NOT PUNISH FOR OFFENSES POTENTIALLY PUNISHABLE BY STATE AND FOREIGN AUTHORITIES.

The petitioner was charged with bringing in obscene and lewd photos, but the sub silentio charges were the aggravation introduced at sentencing that the petitioner had homosexual relations with the two male youths in the photos and possibly others. The acknowledged homosexual contacts[5]

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[5] The prosecutor noted that the petitioner acknowledged sexual contact with three boys (SRT 7), but she claimed there was more in light of the body dimensions in his notebook and the number of photographs (SRT 7). One young male was 15 1/2 years, another was 17 1/2 years, but the age of third male was unknown.

occurred in Arizona, California, and Mexico. Such conduct is proscribed by the states who could have initiated charges against the petitioner, but did not[6]. The federal district court used the federal offenses as an open-ended punishment umbrella to sanction for possible state offenses rather than limit punishment to the charged federal offenses.

The petitioner recognizes the right of the district court to be fully informed about the offense and the offender (**Williams v. New York**, 337 U.S. 241 (1949), but the imposition of the maximum punishment directed at his homosexual contacts with

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[6] Under California law the maximum penalty for oral copulation with a minor over 14 but under 18 years is a prison term of three years. Cal. Penal Code section 288a(b)(1) and (2). California also has a criminal law for bringing matter depicting sexual conduct into the state punishable by a maximum of three years confinement, but requires an intent to distribute or exhibit. Cal. Penal Code section 311.2(d). The California statute has an express exemption if the child under the age of 18 is "legally emancipated." Cal. Penal Code section 311.2(f).

youths was improper, and the penalty should have been tailored by the judge's broad discretion to the offenses for which he had been convicted.

"A criminal sentence must be proportionate to the crime for which the defendant has been convicted." **Solem v. Helm**, 463 U.S. 277, 290 (1983). The imposition of a 15-year sentence of imprisonment[7] for the bringing into the United States was disproportionate, because the district court did not limit its concern for punishment to the convicted offense.

CONCLUSION

Because of the significant constitutional questions relating to obscenity and sentencing, this Court is requested to issue a writ of certiorari to

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[7] The petitioner had served approximately 26 months confinement, before being granted probation on a motion to reduce sentence. See note 2, **infra**. The 15 year sentence is still in effect, but suspended.

review this conviction. In the alternative, it is requested that certiorari be granted, the judgment vacated, and the case remanded to the court of appeals to conduct the review required by **Miller v. California**, 413 U.S. 15 (1973) and **New York v. Ferber**, 458 U.S. 747 (1982).

Respectfully submitted,

DATED:24 April 1987

John J. Cleary
Attorney for
Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADOLF MEYER,
Defendant-Appellant.

No. 85-5219
D.C. No.
84-0663-01-JLI
OPINION

Argued and Submitted
May 6, 1986—Pasadena, California

Filed October 14, 1986

Before: James R. Browning, Anthony M. Kennedy and Robert R. Beezer, Circuit Judges.

Opinion by Judge Kennedy

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding

SUMMARY

Criminal Procedure/Criminal Sentencing

Appeal from convictions and sentencing. Affirmed.

This action arises from appellant Meyer's conviction for transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1), and importing obscene photographs in violation of 18 U.S.C. § 545 and 19 U.S.C. § 1305. Meyer was sen-

tenced to the maximum term of imprisonment on each count. The sentences are consecutive.

[1] This court rejects the government's threshold contention that the only issues properly before this court are those related to the sentence. [2] Meyer's first appeal was still pending when the second appeal was filed. [3] Nevertheless, this court declines to review the obscenity of the photographs. The district judge conducted an extended colloquy with Meyer to ensure that he was familar with the stipulation and understood its consequences. In Meyer's presence, defense counsel reiterated that the stipulation was that the photographs were obscene.

[4] This court rejects Meyer's argument that his conviction under section 545 violated his privilege against self-incrimination. Meyer was convicted of importing the photographs not failing to declare them. [5] This court also rejects Meyer's contention that the photographs cannot constitute merchandise because he did not intend to use them for commercial purposes. This court has held that merchandise under section 545 includes items intended for personal use.

[6] In light of the stipulated facts and the statute under which Meyer was convicted, the potential harm posed by Meyer's pedophilia was a proper subject of the sentencing proceeding. [7] Though the judge's remarks taken in isolation might suggest a predisposition to impose the maximum sentence regardless of the evidence, the record shows the judge adequately considered and weighed the testimony as to the treatability of Meyer's pedophilia. [8] The record reflects a permissible and reasonably considered judgment that there was not a great enough likelihood of successful treatment to warrant a sentence other than the maximum. The sentence was harsh but not improper. [9] The district judge was not required to reconcile Meyer's sentence with the sentences that other courts have imposed on other defendants. [10]

Finally, as each statute required proof of an element that the other did not, consecutive sentences were permissible.

COUNSEL

Cleary & Sevilla, John J. Cleary, San Diego, California, for the defendant-appellant.

Joan Weber, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

KENNEDY, Circuit Judge:

On June 30, 1984, customs agents searched appellant's vehicle at the San Ysidro border crossing between Mexico and the United States and found thirteen photographs of the genitals of fifteen and seventeen-year-old boys. Appellant was charged in a superseding indictment with one count of transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct, 18 U.S.C. § 2252(a)(1) (Supp. 1984), and one count of importing obscene photographs in violation of 18 U.S.C. § 545 and 19 U.S.C. § 1305. The trial was without a jury and on stipulated facts. The district court found appellant guilty and sentenced him to the maximum term of imprisonment on each count, ten and five years respectively. The sentences are consecutive. We affirm the convictions and the sentence.

[1] We reject the government's threshold contention that the only issues properly before us are those related to the sentence. When the district judge entered the judgment of conviction at the conclusion of the stipulated facts trial, he tentatively imposed the maximum sentence pending a sen-

tencing study pursuant to 18 U.S.C. § 4205(c). Appellant filed a timely notice of appeal, *see* Fed. R. App. P. 4(b), but later moved to dismiss the appeal. Some time after the motion for dismissal was filed, the sentencing study was completed and the district court affirmed the original sentence. Appellant then timely filed a second appeal which is the appeal before us. The government argues that the motion to dismiss the first appeal forecloses review of the conviction in this second appeal. We disagree.

The government's reliance on *Corey v. United States*, 375 U.S. 169 (1963), is misplaced. *Corey* holds that where, as here, a defendant is convicted and tentatively sentenced pending a sentencing study, he may appeal in either of two ways. First, the defendant can immediately appeal the conviction and then separately appeal the sentence when the study is completed and final sentence imposed. Second, the defendant can wait until the final sentence is imposed and then challenge both the conviction and the sentence in one appeal. *Id.* at 173-74 & n.15. Though *Corey* makes clear that a defendant who elects the former option is not entitled to two appeals on the merits of his conviction, *id.* at 174 & n.15, *Corey* does not address the pertinent question of the scope of the second appeal where the first appeal is dismissed without reaching the merits.

[2] It is true that the Tenth Circuit in *Jack v. United States*, 341 F.2d 273 (10th Cir. 1965), construed *Corey* to foreclose review of the conviction in the second appeal where the first appeal is dismissed without objection from the defendant. *Id.* at 275. However, even assuming we were to follow *Jack* on its facts, that case is distinguishable. In *Jack* the motion to dismiss the first appeal was granted several months before the final sentence was imposed and the second notice of appeal filed. Here, in contrast, appellant's motion for dismissal was not granted until *after* the sentence was final and the second notice of appeal was filed. Thus appellant's first appeal was still pending when the second appeal was filed. The govern-

ment does not explain why the subsequent dismissal of the first appeal should limit the scope of the second. Appellant is not precluded from challenging his conviction in the appeal before us.

[3] Nevertheless, we decline to review the obscenity of the photographs. In the district court, appellant and his counsel signed a written stipulation that the photographs were obscene. At the stipulated facts trial, the district judge conducted an extended colloquy with appellant to ensure that he was familiar with the stipulation and understood its consequences. *See United States v. Miller*, 588 F.2d 1256, 1264 (9th Cir.) (trial judge should ensure that stipulation is voluntary), *cert denied*, 440 U.S. 947 (1979). The judge informed appellant of the maximum sentence he faced and appellant indicated he was willing to proceed with the stipulated facts trial. In appellant's presence, defense counsel reiterated that the "stipulation on my part and Mr. Meyer's" was that the photographs were obscene. There is no indication that the stipulation was involuntary or that the defendant was unaware of its contents. Consequently, appellant is bound by the stipulation. *See United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981). To the extent appellant asserts that his attorney's decision to concede obscenity constituted ineffective assistance of counsel, his contention rests on facts not developed on this direct appeal and he is free to pursue the contention in a collateral proceeding under 28 U.S.C. § 2255. *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978); *see United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984) ("customary procedure in this Circuit for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255"), *cert denied*, 105 S. Ct. 1772 (1985).

[4] We reject appellant's argument, raised for the first time on appeal, that his conviction under 18 U.S.C. § 545 violated his privilege against self-incrimination. Appellant was con-

victed of importing the photographs, not of failing to declare them. The indictment charged appellant under the second paragraph of 18 U.S.C. § 545, which proscribes "knowingly import[ing] or bring[ing] into the United States, any merchandise contrary to law . . . ." The indictment referred to 19 U.S.C. § 1305, which prohibits the importation of obscene articles. As appellant was not charged with failing to declare the photographs, no self-incrimination issue presented here.

[5] We reject appellant's next contention, also raised for the first time on appeal, that the photographs cannot constitute "merchandise" within the meaning of 18 U.S.C. § 545 because he did not intend to use them for commercial purposes. The argument is meritless, as we have held that "merchandise" under section 545 includes items intended for personal noncommercial use. *United States v. Hall*, 559 F.2d 1160, 1165 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978). Appellant's intended use of the photographs is irrelevant.

Appellant also argues for the first time on appeal that Count I of the indictment charging violation of 18 U.S.C. § 2252 did not give him adequate notice of the crime charged, because it stated that the photographs depicted "lewd" exhibition of the genitals, while the statute in effect when appellant committed the crime required "lascivious" exhibition. 18 U.S.C. § 2255(2)(E) (Supp. 1984). We reject appellant's contention as we fail to see how the wording of the indictment impaired his defense. *See United States v. Pheaster*, 544 F.2d 353, 363 (9th Cir. 1976), *cert. denied sub nom. Incisio v. United States*, 429 U.S. 1099 (1977). The statute was amended from "lewd" to "lascivious" shortly before appellant committed the crime, *see* 18 U.S.C. § 2253(2)(E) (1982) (former version of section 2255, renumbered and amended May 21, 1984), and as appellant concedes, the legislative history suggests that the amendment was only "technical." H.R. Rep. No. 536, 98th Cong., 1st Sess. 8, *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 499. Appellant does not seriously suggest that he was confused as to the charges he had to meet, *see Pheaster*,

544 F.2d at 363, and under the circumstances the indictment's correct citation to the statute was adequate to inform that lasciviousness was an element of the crime, *see United States v. Coleman*, 656 F.2d 509, 511-12 (9th Cir. 1981).

We next turn to appellant's contention that his fifteen-year sentence is unduly harsh. Our authority to review a sentence is narrow. *United States v. Hall*, 778 F.2d 1427, 1428 (9th Cir. 1985). A sentence within the statutory limits is generally not reviewable. *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). Though appellant suggests the maximum sentence was unwarranted, imposition of the maximum term of imprisonment does not in and of itself trigger appellate scrutiny. *United States v. Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985).

[6] The trial judge took extensive testimony on the characteristics and recidivist tendencies of pedophiles, and the argument on appeal seems to be that the judge drew erroneous conclusions from that testimony and was unduly influenced by it. We find no error here. The statute under which appellant was convicted was intended to combat the sexual exploitation of minors. S. Rep. No. 438, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 42-43 (legislative history of the Protection of Children Against Sexual Exploitation Act of 1977 (current version at 18 U.S.C. §§ 2251-55 (Supp. 1984))). Though appellant was sentenced on counts pertaining to transporting and importing the photographs, it was stipulated that he took the pictures himself and engaged in sex acts with the minors involved. The district judge gave weight to testimony that the young victims of pedophiles may suffer severe psychological and emotional injury, and may become pedophiles themselves. In light of the stipulated facts and the statute under which appellant was convicted, the potential harm posed by appellant's pedophilia was a proper subject of the sentencing proceeding.

[7] Appellant contends that certain comments by the district judge reflect a failure to consider the evidence and were

tantamount to an automatic imposition of the maximum sentence, violating the principle that the judge must exercise his discretion so that sentencing is directed to the individual before the court. *Barker*, 771 F.2d at 1364-65; *see Dorszynski v. United States*, 418 U.S. 424, 443 (1974); *United States v. Lopez-Gonzales*, 688 F.2d 1275, 1276 (9th Cir. 1982). The district judge ordered a sentencing study under 18 U.S.C. § 4205(c) to determine whether appellant's pedophilia was treatable. When the judge ordered the study, he cautioned appellant against harboring "false hope" of receiving a sentence less than the maximum. The judge indicated he would impose the maximum sentence if the study left open "any kind of chance that [appellant] is going to repeat and molest any other young boys." When the study was completed, the judge stated that "there is no 100 percent guarantee if treatment is engaged in that this defendant will not repeat." Though the judge's remarks taken in isolation might suggest a predisposition to impose the maximum sentence regardless of the evidence, the record shows the judge adequately considered and weighed the testimony.

[8] Appellant is wrong that the district judge mechanically imposed the maximum sentence and ignored overwhelming evidence in favor of the likelihood of successful treatment. Though the defense expert Dr. Schwartz estimated there was a good probability of successful treatment for appellant, he stressed that accurate predictions in individual cases are difficult. The district judge weighed Dr. Schwartz's estimate, noting that it contradicted the earlier testimony of William Dworin, a police specialist who opined that the likelihood of successful treatment is low. Detective Dworin had investigated between 1,200 and 1,500 child molestation cases, and the district judge stated on the record that Dworin was a well-qualified witness because of his background. It is true that Dr. Friedman, who conducted the study under section 4205(c), also estimated the probability was high that appellant, if treated, would cease his sexual activity with minors. The district judge, however, considered Dr. Friedman's report and

discredited it on the ground that Dr. Friedman had never treated pedophiles. Further, Dr. Friedman's report stated that appellant's criminal record which included sexual offenses weighed against successful treatment, and the district judge expressly considered appellant's criminal record at the sentencing proceeding. The record reflects a permissible and reasonably considered judgment that there was not a great enough likelihood of successful treatment to warrant a sentence other than the maximum. The sentence was harsh but not improper.

[9] Appellant also argues that his sentence violates the Supreme Court's ruling in *Solem v. Helm*, 463 U.S. 277 (1983), that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290. Appellant submitted to the district judge a consultant's report purporting to show that defendants convicted of committing "lewd or lascivious acts with child under age 14" in violation of California Penal Code § 288 (West Supp. 1986) typically are sentenced to relatively short terms of imprisonment. Appellant also brought to the district judge's attention at least one federal case, *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986), in which a defendant convicted under 18 U.S.C. §§ 545 and 2252 was fined and sentenced to a probationary term. *Hale*, 784 F.2d at 1471 n.4. Appellant argues that the district judge was required under *Helm* to harmonize appellant's sentence with the sentences imposed under the same or related offenses in state court and in other federal courts. We disagree. In *Helm* the Supreme Court acknowledged the trial judge's discretion to impose a sentence within permissible statutory limits. *Helm*, 463 U.S. at 290 & n.16. In a post-*Helm* case, we stated that a district court "is not required to harmonize its view of appropriate sentencing with that of other district courts . . . ." *Barker*, 771 F.2d at 1367. Because individual circumstances may vary from one offender to another, persons convicted of the same crime need not receive similar sentences. *Hall*, 778 F.2d at 1428. The district judge was not required to reconcile appellant's

sentence with the sentences that other courts have imposed on other defendants.

Finally, appellant argues that it was improper to impose consecutive rather than concurrent sentences. Appellant does not dispute that the district judge's sentencing discretion extends to the decision whether to impose consecutive sentences. *United States v. Miller*, 650 F.2d 169, 170 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). Appellant's contention is that double jeopardy principles forbid consecutive sentencing under 18 U.S.C. § 545 and 18 U.S.C. § 2252.

[10] The test to determine if two statutory offenses may be punished cumulatively is whether each statute requires proof of a fact that the other does not. *Albernaz v. United States*, 450 U.S. 333, 337-38 (1981) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). When two statutes are not the same offense under the *Blockburger* test, it is presumed that Congress did not intend to preclude multiple punishment. *Missouri v. Hunter*, 459 U.S. 359, 367 (1983); *Albernaz*, 450 U.S. at 340. Here, each statute required proof of an element that the other did not. Section 545 requires that the importation be "contrary to law," and the indictment referred to 19 U.S.C. § 1305, which prohibits the importation of obscene pictures. Thus, appellant's conviction under 18 U.S.C. § 545 required that the photographs be obscene. In contract, section 2252 does not refer to obscenity, and the legislative history makes clear that obscenity is not required. H.R. Rep. No. 536, 98th Cong., 1st Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 498. Section 2252 requires that the photographs depict minors, an element not present in 18 U.S.C. § 545 and 19 U.S.C. § 1305. As each statute required proof of an element that the other did not, consecutive sentences were permissible.

Appellant's convictions and sentence are AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADOLF MEYER, Defendant-Appellant.	No. 85-5219 D.C. No. 84-0663-01-JLI ORDER FILED: FEBRUARY 25, 1987

Appeal from the United States District Court for the Southern District of California

Before: BROWNING, KENNEDY, and BEEZER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

APPENDIX B

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.